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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LAM RESEARCH CORP.,

Petitioner,

v.

DANIEL L. FLAMM,

Patent Owner.

CASE IPR2015-01767
U.S. Patent No. 6,017,221

**PATENT OWNER'S RESPONSE IN OPPOSITION TO
LAM RESEARCH CORP.'S MOTION TO EXCLUDE
THE DECLARATION OF DANIEL L. FLAMM, Sc.D**

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Lam's motion to exclude Dr. Flamm's Declaration must be denied because Lam failed to timely object to it and, thereby, waived its objections. Even if the Board were inclined to excuse Lam's failure to timely object, Lam's motion should also be denied because Lam fails to establish any basis to exclude that testimony. At best, Lam's arguments are directed toward the weight that should be afforded to Dr. Flamm's Declaration rather than its admissibility.

I. LAM FAILED TO TIMELY OBJECT TO DR. FLAMM'S DECLARATION

Lam has waived any objection to Dr. Flamm's Declaration by failing to timely object to it. As a consequence, Lam also failed to comply with the rules applicable to motions to exclude evidence. For those reasons, Lam's motion must be denied.

The rules for objecting to evidence in proceedings before the Board are clear:

Once a trial has been instituted, any objection must be filed within ten business days of service of evidence to which the objection is directed. The objection must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence.

37 C.F.R. § 42.64(b)(1). The filing of a timely objection allows the proponent of the evidence to cure the defect through the submission of supplemental evidence.

Id. § 42.64(b)(2).

A party cannot seek to exclude evidence to which it has failed to timely object:

A motion to exclude evidence must be filed to preserve any objection. The motion must identify the objections in the record in order and must explain the objections.

Id. § 42.64(c); *see also* Office Patent Trial Guide, Fed. Reg. Vol. 77, No. 157 (Aug. 14, 2012) at 48767 (“A party wishing to challenge the admissibility of evidence must object timely to the evidence at the point it is offered and then preserve the objection by filing a motion to exclude the evidence. . . . A motion to exclude evidence must: (a) Identify where in the record the objection originally was made”); *see also* *Google v. Jongerius Panoramic Tech., LLC*, No. IPR2013-00191, Paper 70 (available at 2014 Pat. App. LEXIS 9111, *88) (Aug. 12, 2014 P.T.A.B.) (denying motion to exclude evidence based on the absence of timely objection).

Here, Dr. Flamm’s Declaration was submitted on May 16, 2016 as part of the Patent Owner’s Response. (IPR2015-01767, Paper 15.) Lam never filed any objection to Dr. Flamm’s Declaration and its instant motion fails to identify any such objection in the record. Lam has, therefore, waived any objections to Dr. Flamm’s Declaration and its motion to exclude that evidence must be denied.

II. LAM IS IMPROPERLY SEEKING TO PREJUDICE DR. FLAMM'S CREDIBILITY BEFORE THE BOARD

In light of Lam's failure to even attempt to comply with the rules applicable to motions to exclude evidence, it appears that the purpose of Lam's motion is not a serious attempt to exclude Dr. Flamm's testimony, but rather is an attempt to preemptively discredit Dr. Flamm in the eyes of the Board. Lam's true motivation is evidenced by the fact that Lam's arguments go to the weight to be afforded to Dr. Flamm's Declaration rather than its admissibility.

At the threshold, it is worth noting a consideration ignored by Lam:

there is a strong public policy for making all information filed in an administrative proceeding available to the public, especially in a *inter partes* review, which determines the patentability of claims in an issued patent. It is better to have a complete record of the evidence submitted by the parties than to exclude particular pieces of evidence.

Biomarin Pharmaceutical Inc. v. Genzyme Therapeutic Products Limited Partnership, No. IPR2013-00537, Paper 79 (available at 2015 Pat. App. LEXIS 2306, *37) (Feb. 23, 2015 P.T.A.B.) (denying motion to exclude expert declaration based on expert's purported lack of expertise in the subject area, finding objections went "to the weight and sufficiency of the testimony, rather than its admissibility").

Despite that strong public policy, Lam's position is that the Board should exclude Dr. Flamm's Declaration because Dr. Flamm is unqualified to render an

opinion here and because Dr. Flamm has an interest in the outcome of this proceeding. Those arguments lack merit.

Lam's assertion that Dr. Flamm is not qualified to testify about the field of his own invention borders on farcical. Dr. Flamm received a Bachelor of Science degree from MIT, with a major in mathematics and a minor in physics. (Flamm Decl. at Appendix A.) Dr. Flamm went on to receive a Master of Science and a Doctor of Science from MIT in the field of chemical engineering. (*Id.*) In the forty-six years since Dr. Flamm received his doctorate degree, he has been a leading researcher and educator in the field of semiconductor processing technology. (Flamm Decl. ¶ 2, App. A.) He was recognized as a *Distinguished Member of Technical Staff* at the world renowned AT&T Bell Laboratories, where his work focused his work on:

Pioneering Research in plasma etching, plasma chemical vapor deposition, optoelectronics materials processing. Discovered/patented novel plasma chemistries and plasma sources, directional plasma CVD, fluorinated silicon nitride, oxygen enhanced diamond film deposition, laser induced fluorescence diagnostics, photochemical-distillation purification technology.

(*Id.* at App. A.) Dr. Flamm went on to research and teach at the world renowned University of California, Berkeley and Lawrence Livermore Laboratories. (*Id.*)

While there, Dr. Flamm:

Taught graduate seminars in plasma processing and

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